

REED, District Judge, dissenting:

I respectfully dissent. Only two issues are validly raised on this appeal: (1) whether the district court erred in determining that the Chloe Z was not equitably estopped from asserting the statute of limitations and (2) whether the district court erred in denying the injured seamen's motions to consolidate their *in rem* claims with TCW's mortgage foreclosure against the Chloe Z. Having concluded that neither of these decisions was error, the court nonetheless decides the case in favor of Appellants Matos and Pranjic by finding that the statute of limitations on their *in rem* claims was tolled by their abandoned 1994 *in rem* action against the Chloe Z.

As an initial matter, I agree with Appellee's contention that our 1999 remand on the issue of equitable estoppel implicitly held that, absent such estoppel, the statute of limitations was a bar. Accordingly, our reconsideration of that argument here is inappropriate, particularly given the six years of additional litigation our prior holding spawned.

Looking beyond the prior holding to the merits of the argument, I see no basis for tolling Appellants' claims against the Chloe Z. A claim may be

tolled by statute or in equity. *See Nelson v. Int'l Paint Co.*, 716 F.2d 640, 645 (9th Cir. 1983). No statute tolled the Appellants' claims, so any tolling must be equitable. The doctrine of equitable tolling allows the court to toll the running of a statute of limitations "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). In rejecting Appellants' equitable estoppel appeal, the court here accepts the district court's finding that Appellants' failure to pursue their 1994 *in rem* complaint against the Chloe Z was the product of poor judgment, not a defective pleading or any misconduct by the Chloe Z. This is tantamount to a finding that the decision not to try the 1994 *in rem* claims was "garden variety excusable neglect," which precludes equitable tolling. *Id.*

Because voluntary dismissal of a claim eliminates the possibility of tolling, the question of whether Appellants voluntarily dismissed their claims against the Chloe Z has become almost the dispositive issue in this case. The majority acknowledges that the parties twice stipulated to dismissal of the *in rem* claims against the Chloe Z, but finds that the

stipulations had no effect because they did not comply with the District of Guam's Local Rule 3-2, which states that "stipulations shall not be effective unless approved by the judge." I cannot agree with this conclusion.

Although it is true that Judge Coughenour, the district court judge who presided over the 1994 lawsuit, did not *sign* the dismissal stipulations, he did *approve* them, which is all that Local Rule 3-2 requires. The record makes it clear that the parties discussed the dismissal of the *in rem* claims against the Chloe Z with Judge Coughenour at the May 1999 pre-trial conference when they discussed the fact that the *in personam* defendant was going bankrupt and would likely not be able to pay any judgment. There is no doubt that Judge Coughenour knew of the stipulated dismissal and the possibility that Appellants would not be able to collect a judgment for their injuries from the *in personam* defendant. The fact that Judge Coughenour allowed the trial to go forward without the participation of Chloe Z evidences his tacit, if not explicit, approval of the dismissal.

In an attempt to shrug off these concerns, the disposition makes two assertions that directly contradict the record. First, the disposition states that "the defendant has not challenged [the District of Guam's Local Rule 3-2]." Contrary to that statement, the Chloe Z argued in its 1999 appeal that Local

Rule 3-2 directly contradicts Federal Rule of Civil Procedure 41, which allows parties to stipulate to dismissal without court order. See, e.g., *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 888 & n.9 (9th Cir. 2003). If the district court's local rule contradicts the federal rule, the local rule is void. See *Atchison, Topeka and Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998). This argument against the finding that the stipulated dismissals were invalid is not trivial, yet has been dismissed without analysis in our dispositions of both the current and the 1999 appeals. It is true that this argument was not raised in the current appeal, but neither was the issue of whether the plaintiffs' *in rem* claims were barred by the statute of limitations. Since we are revisiting the statute of limitations question, fairness dictates that we revisit the Chloe Z's arguments as to why the stipulated dismissals should be considered effective.

Along the same lines, the disposition claims that the Chloe Z admits that the stipulations were ineffective. Looking at the record as a whole, I do not believe it is fair to conclude that the Chloe Z admits that the *in rem* claims were still pending in 1996. The Chloe Z argued twice that the *in rem* action was not pending because of the stipulated dismissal in the 1994 lawsuit—once in its motion for reconsideration of the District Court's denial

of the Chloe Z's motion to vacate the Plaintiffs' warrant for arrest of the Chloe Z and once in its opposition brief in the 1999 appeal. Having seen this argument rejected by the District Court and ignored by the 1999 panel in its memorandum disposition, it is not surprising that Appellee argued here from the position that the *in rem* claim was still pending in July 1996 in this appeal. Further, it had nothing to lose by going along with the court's ruling, because the equitable estoppel hearing assumed that the statute of limitations would be a bar to the complaint-in-intervention, regardless of whether the *in rem* claim was pending in July 1996. If we had informed the parties that we were revisiting the issue of whether the statute of limitations had passed, I doubt that the Chloe Z would have accepted that the stipulated dismissals were ineffective without argument.

Moreover, regardless of whether the stipulated dismissals were effective, Appellants' failure to produce evidence and argument regarding their *in rem* claims during the 1996 trial on the first complaint acted as a voluntary dismissal of those claims, so it does not matter whether the *in rem* claims were still pending prior to trial. If the *in rem* claims were still pending when the other claims went to trial, Appellants had a duty to present evidence and argue those claims or face both waiver on appeal and claim

preclusion in subsequent lawsuits. These doctrines exist, at least in part, to promote timely presentation of evidence and protect against stale claims—the same policies served by statutes of limitation. Accordingly, failure to produce evidence and argument in support of a claim during trial should be treated the same as a voluntary dismissal for purposes of tolling.